

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SHIRLEY R. HICKS
Claimant

VS.

STATE OF KANSAS
Respondent

AND

STATE SELF INSURANCE FUND
Insurance Carrier

AND

THE KANSAS WORKERS COMPENSATION FUND

Docket No. 168,888

ORDER

The claimant appeals the decision of Administrative Law Judge Shannon S. Krysl entered in this proceeding on December 20, 1994. The Appeals Board heard oral argument on March 16, 1995. This is a request to review and modify the initial award entered in this proceeding on February 22, 1994.

APPEARANCES

Claimant appeared by her attorney, Joseph Seiwert of Wichita, Kansas. The respondent and its insurance carrier appeared by their attorney, Kendall Cunningham of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, John C. Nodgaard of Wichita, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board is enumerated in the Award of the Administrative Law Judge. In addition, the parties advised that the medical report of Philip R. Mills, M.D., dated November 21, 1994, was part of the evidentiary record although it was not listed as such.

STIPULATIONS

The stipulations of the parties are listed in the Award of the Administrative Law Judge and are adopted by the Appeals Board for this review.

ISSUE

In this review and modification proceeding, the Administrative Law Judge found a fourteen and one-half percent (14.5%) work disability for bilateral carpal tunnel syndrome and awarded claimant benefits based upon that disability. Because in the initial award claimant was granted permanent partial general disability benefits based upon the functional impairment rating of twelve and one-half percent (12.5%), claimant's benefits have been increased. The claimant requested review and contends the Administrative Law Judge erred in the determination of the amount of work disability claimant has experienced. Although the Administrative Law Judge decided this review and modification proceeding with a companion case, Docket No. 181,305, the Appeals Board is separating these proceedings for purposes of award. The issues addressed in this review are:

- (1) Whether claimant is entitled to additional workers compensation benefits in this review and modification proceeding for the subsequent development of bilateral epicondylitis, or whether the development of the condition constitutes a new accidental injury and should be addressed in the companion case, docket No. 181,305.
- (2) Whether the award in this proceeding should be modified either as a result of additional disability as a result of either increased physical impairment or the existence of work disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds, as follows:

- (1) For the reasons expressed below, the modification of claimant's award of permanent partial general disability benefits based upon a fourteen and one-half percent (14.5%) work disability should be affirmed.

In the initial award entered in this proceeding on February 22, 1994, claimant was granted permanent partial general disability benefits for bilateral carpal tunnel syndrome based upon a twelve and one-half percent (12.5%) functional impairment rating. The award was not appealed. Claimant has now developed bilateral epicondylitis and, therefore, now experiences additional functional impairment. Not knowing whether the epicondylitis was a natural and probable consequence of the carpal tunnel syndrome or if it constitutes a new and distinct work-related accident, claimant filed for review and modification in this proceeding and simultaneously filed a new claim in the companion case encompassed in Docket No. 181,305.

Although the bilateral carpal tunnel syndrome may have predisposed claimant to epicondylitis, based upon the fact the condition is a distinct pathological entity separate and apart from carpal tunnel syndrome and the additional fact the medical evidence strongly supports the conclusion the condition was either caused or aggravated by claimant's repetitive work activities performed after returning to work in February 1993, the Appeals Board finds the condition constitutes a new and distinct injury. Therefore, any benefits payable for that injury should be addressed in a separate proceeding rather than in this proceeding for review and modification.

- (2) Although benefits for the epicondylitis condition should be addressed in Docket No. 181,305, claimant is entitled to review and modification of the award previously entered in this proceeding. After treatment for her carpal tunnel syndrome, claimant returned to work for the respondent at a comparable wage in February 1993. At the time of her return, respondent believed claimant's doctor had restricted her to limited typing and keyboard work. With that belief, claimant was placed in a position where she occasionally used a

computer. When the parties discovered that claimant's treating physician, Tyrone D. Artz, M.D., had intended to restrict claimant from all typing and keyboard work, respondent changed claimant's duties. Effective January 18, 1994, claimant was permanently reassigned from the position of Social Worker to a Process II position due to Dr. Artz's restrictions of no keyboard work. Because of the reassignment, claimant's monthly salary was reduced from \$1,963 per month to \$1,679 per month. Claimant continued to work at her new position until May 25, 1994, when she took sick leave due to numerous health problems.

An award may be reviewed for good cause shown upon the application of any interested party and modified when the functional impairment or work disability has increased or diminished. See K.S.A. 44-528.

The medical evidence is uncontroverted that claimant's functional impairment for the bilateral carpal tunnel syndrome is unchanged since the initial award of benefits. However, the demotion and resultant loss of wage is sufficient to remove the presumption of no work disability encompassed in K.S.A. 1992 Supp. 44-510e, and permits modification of the award.

The Appeals Board agrees with the finding of the Administrative Law Judge that claimant has experienced a fourteen and one-half percent (14.5%) wage loss as a result of her demotion and is entitled to permanent partial disability benefits based upon a similar percentage of work disability. The Appeals Board is cognizant that K.S.A. 1992 Supp. 44-510e requires the finder of fact to consider both the loss of ability to perform work in the open labor market and the loss of ability to earn comparable wage. See Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990). However, it is not error for the trier of fact to give more weight to one of the elements of loss than the other. See Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409 rev. denied 250 Kan. 806 (1991). In this instance claimant's work disability should be based upon wage loss only.

The findings and conclusions of the Administrative Law Judge as expressed in the Award of December 20, 1994, entered herein are hereby adopted by the Appeals Board to the extent that they are not inconsistent with the specific findings and conclusions set forth in this Order.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the review and modification Award of Administrative Law Judge Shannon S. Krysl entered in this proceeding on December 20, 1994, should be, and hereby is, affirmed in all respects. Pursuant to the stipulations of the parties, the Workers Compensation Fund is responsible for fifty percent (50%) of the costs and benefits associated with this Award.

IT IS SO ORDERED.

Dated this ____ day of March, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully disagree with the majority decision. I feel claimant's loss of access to the open labor market should be considered and be given equal weight in the analysis of work disability. Claimant has had numerous surgeries for the bilateral carpal tunnel condition and continues to experience significant impairment and restrictions in her activities. Claimant's injuries are severe and disabling. Therefore, justice requires the consideration of both loss of ability to perform work in the open labor market and loss of ability to earn a comparable wage. As labor market expert James Molski testified, claimant lost her ability to perform forty-five to fifty percent (45-50%) of the jobs in the open labor market considering the restrictions of her treating physician, Tyrone D. Artz, M.D.

BOARD MEMBER

c: Joseph Seiwert, Wichita, KS
Kendall Cunningham, Wichita, KS
John C. Nodgaard, Wichita, KS
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director